88-365

No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

APRIL RIVARD, et al.,
Petitioners,

v.

CHICAGO FIRE FIGHTERS UNION,
LOCAL NO. 2, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

I. WHETHER THE COMMON LAW RULE THAT UNINCORPORATED ASSOCIATIONS MAY NOT SUE OR BE SUED IN THEIR OWN NAME IN THE COURTS OF LAW VIOLATES PETITIONERS' FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS AS GUARANTEED BY (A) THE DUE PROCESS CLAUSE AND (B) THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

II. WHETHER THE COMMON LAW RULE THAT UNINCORPORATED ASSOCIATIONS MAY NOT SUE OR BE SUED IN THEIR OWN NAME IN THE COURTS OF LAW VIOLATES THE PETITIONERS' RIGHT (A) TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT AS OUGHT TO BE MADE APPLICABLE TO THE STATES AND (B) THEIR FIRST AMENDMENT RIGHT TO PETITION STATE COURTS FOR REDRESS AS PREVIOUSLY MADE APPLICABLE TO THE STATES.

PARTIES TO THE PROCEEDINGS

The Petitioners, Plaintiffs-Appellees in the Court below, are April Rivard and Robert Oliver, Administrator of the Estate of Latrice Louise Rivard, deceased. The Petitioners are joined in this Petition by Bonnell Carter, Administrator of the Estates of Martha Carter, Caenzell Carter, Harvey Carter, and Henry Carter, deceased, and Harvey Teague and Marth Teague, as Administrator of theEstate of Harvey Teague II, deceased (the Carter Petitioners). The Carter Petitioners joined the Rivard briefs in the court below as Plaintiffs-Appellees.

The Respondents, Defendants-Appellees in the court below are the Chicago Fire Fighters Union, Local No.2, the International Association of Fire Fighters, AFL-CIO, Frank Muscare, as

President, William Reddy, as First Vice-President and Frank Murphy, as Second Vice-President, all of the Chicago Fire Fighters Union.

RULE 28.4(c) STATEMENT: Pursuant to Rule 28.4(c) of the Rules of this Court, Petitioners hereby state that 28 U.S.C. sec. 2403 (b) may be applicable because the constitutionality of a law of the State of Illinois is drawn into question and the State is not a party to this action. Petitioners hereby certify that they are serving three copies of this Petition on the Attorney General of the State of Illinois.

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OTHER MATERIAL

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Cole, The Civil Suability, at Law
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Documents Illustrative of the
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PETITION FOR A WRIT OF CERTIORARI TO THE
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OPINIONS BELOW

The May 31, 1988 Denial of Rehearing by the Supreme Court of Illinois is unreported and reprinted in the Appendix at A-1. The March 23, 1988 opinion of the Supreme Court of Illinois is reported at 122 Ill.2d 303, 119 Ill. Dec. 336, 522 N.E.2d 1195 (1988) and is reprinted in the Appendix at A-2. The June 4, 1986 opinion of the Appellate Court of

Illinois, First Judicial District, Third Division is reported at 145 Ill. App.3d 835, 86 Ill. Dec. 951, 494 N.E.2d 756, 122 L.R.R.M. 2493 (1986) and is reprinted in the Appendix at A-9. The orders of the Circuit Court of Cook County, Illinois, County Division, Law Department are unreported and reprinted in the Appendix at A-15.

JURISDICTION

The opinion of the Supreme Court of Illinois reversing the opinion of the Illinois Appellate Court, First Judicial District, Third Division was entered on March 23, 1988. A timely petition for rehearing was denied on May 31, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First, Seventh and First Section of the Fourteenth Articles of Amendment to the Constitution of the United States of America are set out in the Appendix at A-27. Public Act 83-901 of the Eighty-Third General Assembly of Illinois, Ill. Rev. Stat. 1987, Ch. 110, pars. 2-102, 2-205.1, 2-209.1, is set out in the Appendix at A-29.

STATEMENT OF THE CASE

On February 18, 1980, the Chicago Fire Fighters Union, Local No. 2 (Local Union), an affiliate of the International Association of Fire Fighters (International Association), called a strike in which the overwhelming majority of Chicago fire fighters took part. On that same day, a Judge of the Circuit Court of Cook County, Illinois ordered the fire fighters back to work. The court took this action in reliance on pronouncements of the Illinois Supreme

Court that, in the absence of an authorizing statute, public employee strikes are illegal and enjoinable. In violation of that court order, the Local Union, with the aid and advice of the International Association, proceeded with its strike. After the collapse of a settlement agreement in mid-February, the trial court found, inter alia, the actions of the Local Union President, Frank Muscare, and the Local Union itself so willful, contumacious, and calculated to defy the authority of the law that it jailed President Muscare and levied large fines against union officers and the Union. City of Chicago v. Chicago Fire Fighters Union, Local No.2, 99 Ill. App.3d 583, 54 Ill. Dec. 854, 425 N.E.2d 1071 (1st Dist. 1981), application to direct the clerk to file writ of Certiorari denied, 455 U.S. 1010 (1982) (wherein the facts concerning the strike and related court proceedings are found

in greater detail). The strike was eventually settled on March 8, 1980.

The home of the Petitioners April Rivard and Latrice Louise Rivard, deceased burned down on March 5, 1980. April Rivard sustained severe burns in the blaze. Her mother, Latrice, died in the fire. The Carter Petitioners died in a fire in Chicago on March 4, 1980.

The Rivard and Carter Petitioners brought separate suits in the Circuit Court of Cook County, Illinois. The suits requested money damages for the Petitioners' injuries. The suits sounded in contract (third-party beneficiary of a contract) and tort (ordinary negligence, willful and wanton negligence, negligence per se, strict liability and public nuisance). The Petitioners sued certain officers of the Local Union and both unions. Both of the unions are unincorporated associations.

Under Illinois common law, an association is any "collection of persons who have joined together for a certain object," People v. Brander, 244 Ill. 26, 31, 91 N.E. 59, 60 (1910), and is simply the members who comprise it operating under a common name. O'Connell v. Lamb, 63 Ill. App. 652, 655-56 (1895). Thus, under Illinois common law, the association and the members are the same thing, indistinguishable from one another. For this reason the courts have held that a member of the association could not go to court to seek redress against the association because "any member who brought suit against the association was in effect suing himself...." Note, Unincorporated Associations, 9 Akron L.Rev. 602, 604 (1976). In Illinois, the common law rule came to be that because "an unincorporated association has no separate legal existence independent of

the members who compose it," Am. Fed. Tech. Eng'rs v. La Jeunesse, 63 Ill.2d 263, 265-66, 347 N.E.2d 712, 714 (1976), an association had no separate legal existence. Thus, Illinois common law theory came to the conclusion that in an action at common law, "a voluntary unincorporated association could not sue or be sued in its own name." Id. Rather, "[i]f an action was to be brought by or against the association it was necessary that all members be joined as parties." Id.

The Respondents moved to dismiss the suit on the grounds that the Respondents were unincorporated associations or representatives of unincorporated associations. The Petitioners responded that the Illinois courts could and should change the common law rule. Petitioners also stated that the rule and its application was arbitrary, capricious and irrational and denied them access to the

courts in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and relevant sections of the Illinois Constitution. The Circuit Court did not rule on Petitioners' constitutional claims, but dismissed the lawsuit as one against unincorporated associations or their representatives. The Petitioners appealed that ruling.

While this case was pending before the Appellate Court of Illinois, the General Assembly passed Public Act 83-901. That Act declared that unincorporated associations could sue and be sued in their own name. The Act also specified venue and the manner of service. In signing the bill, the Governor exercised his amendatory veto power and inserted a clause making the application of the Act prospective only The Illinois General Assembly overrode the Governor's amendatory veto.

In the Illinois Appellate Court, the Petitioners asserted that Public Act 83-901 should be applied to them. They also asserted that the common law should be changed. They further asserted that the common law rule denied them their rights under the Seventh and Fourteenth Amendments to the United States Constitution as well as corresponding parts of the Illinois Constitution.

The Appellate Court of Illinois did not address Petitioners' common law or constitutional claims. It reversed the judgment of the Circuit Court and found that Public Act 83-901 was a procedural law and that the legislature meant for it to apply retroactively.

In the Supreme Court of Illinois, the Petitioners defended the Appellate Court decision that Public Act 83-901 was procedural and was intended to act retroactively. The Petitioners further stated that the Court should abandon the

common law rule. Petitioners also stated that application of the common law rule would deny them their rights under the First, Seventh and the Due Process and Equal Protection Clauses of the Fourteenth Amendments to the Federal Constitution as well as similar provisions of the Illinois Constitution.

The Illinois Supreme Court reversed the Appellate Court and found that under Illinois law, Public Act 83-901 was a substantive rather than procedural change in the law. Thus, the court declared, that in the absence of specific language in the Act, the law would not be applied retroactively. The Illinois Supreme Court did not address any of Petitioners common law or constitutional claims. Petitioners, inter alia, renewed their request for a hearing on their Federal constitutional claims for deprivation of rights under the First, Seventh and Fourteenth Amendments in their timely

Petition for Rehearing.[1] The Petitioners also suggested that since no court had ever given them any determination on their federal constitutional claim, that the case could be remanded to the Appellate Court for further consideration. The Petition for Rehearing was denied without comment.

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[1] Between Petitioners' common law and constitutional arguments, the Illinois Supreme Court did not address almost 40 out of 66 pages (or over one-half) of Petitioners' Brief (and of course all of the Petition for Rehearing). Thus, this case is very similar to this Court's first incorporation case, Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897). In that case, the Illinois Supreme Court likewise totally ignored the asserted constitutional arguments. This Court held that because the constitutional claims were asserted in the Illinois Supreme Court, it had preserved the issues for review notwithstanding the lack of an express determination by the lower court. Id. at 231-32. This continues to be the rule. See Illinois v. Gates, 462 U.S. 213, 218 n.1 (1983). Thus, because Petitioners pressed all of its constitutional claims in the court below, this Court has jurisdiction to consider this case.

REASONS FOR GRANTING THE WRIT

I. THE COMMON LAW RULE DENIES PETITIONERS ACCESS TO THE COURTS IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

A. THE DUE PROCESS CLAUSE INSURES MEANINGFUL ACCESS TO THE COURTS.

This Court has held that "'the fundamental requisite of due process is the opportunity to be heard.'" Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950) quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914). The hearing opportunity mandated by the Clause is one that "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). This hearing insures that citizens are protected from arbitrary action by government. Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972); Daniels v. Williams, 474 U.S. 327, 331 (1985) (and cases cited therein). The rule applied by the Illinois courts, that

unincorporated associations may neither sue nor be sued in cases at law violates this elementary principle of due process by the arbitrary manner in which it excludes parties from participation in the court system.

This Court has enunciated a two part test for the application of the Due Process Clause: whether there is a protected interest and what process is due before there may be a deprivation of that protected interest. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (Logan).

First, the Due Process Clause applies to Petitioners' action. Petitioners seek to assert common law tort and contract claims. This Court repeatedly has held that such causes of action are species of property within the meaning of the Due Process Clause. E.g., Logan, 455 U.S. at 428. Thus "[t]he Court traditionally has held that the Due

Process Clauses protect civil litigants who seek recourse in the courts, either as defendants ... or as plaintiffs attempting to redress grievances." Id. at 429. Petitioners are attempting to have their valuable state created claims heard in the only means available: in the courts of Illinois and are entitled to the protections of the Due Process Clause. Id.

Second, because the Due Process Clause applies to the Petitioners' claims, the State must afford them the opportunity for a hearing. Although the state may balance private versus governmental interests in determining the timing and nature of the hearing, the opportunity for a hearing does not depend on a balance and must be granted. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570-71 n. 8 (1972).

The rule applied by the Illinois courts deprives the Petitioners of their

due process rights to have "the opportunity to present [their] case and its merits judged fairly." Logan, 455 U.S. at 433. In fact, Petitioners have no opportunity at all for a hearing on the merits. They are merely told that because they have sued something that the common law says has no separate legal name, they have no right to proceed with their suit. Nor could they ever hope to do so. "Even supposing that the membership of an [association] at any given moment is ascertainable, it is constantly changing, so that there will be of necessity an equally constant and incurable defect of parties defendant." Cole, The Civil Suability, at Law, of Labor Unions, 8 Fordham L.Rev. 29, 31 n.7 (1939). Because the common law rule denies the Petitioners any opportunity for a hearing, it violates fundamental principles of due process.

To the extent that the common law rule has any theoretical viability, it must be judged under the rule announced in Boddie v. Connecticut, 401 U.S. 371 (1971) (Boddie). Although the standard of scrutiny (strict or intermediate) was not precisely prescribed, Justice Harlan, writing for the Court, said, "that absent a countervailing state interest of overriding significance, persons forced to settle their claims through the judicial process must be given a meaningful opportunity to be heard." Boddie, 401 U.S. at 377. Justice Harlan then equated the meaningful opportunity to be heard with other fundamental rights such as "religious freedom, free speech or assembly." Boddie, 401 U.S. at 379. Finally, the Court held that although Connecticut's reasons for its law (that indigents must pay a divorce filing fee) were rational, they were insufficient to override the interest of persons who

needed access to the courts to have their rights settled. Boddie, 401 U.S. at 381-82. Clearly, some form of heightened scrutiny is appropriate when examining laws that bar access to the courts. The Illinois rule concerning unincorporated associations fails any level of scrutiny.

This Court has examined four factors when scrutinizing laws burdening court access: "the importance of the private interest;" "the length or finality of the deprivation;" "the likelihood of governmental error" and "the magnitude of the governmental interest." Logan, 455 U.S. at 434.

The first two of these factors are easily applied. The Petitioners' interest in having their claims redressed are substantial. The lead Petitioner was severely burned and her mother burned to death in the fire that destroyed their home. This suit is her only means of obtaining any compensation for her

losses. Further, the deprivation is final. Petitioners cannot use any "self-help" nor settle with themselves. Dismissal of their suit ends their claim and they "will be 'condemned to suffer grievous loss,'" Morrissey v. Brewer, 408 U.S. 471, 481 (1972) quoting Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., conc.), without any hope of recompense.

Illinois' interest, conversely, is either insubstantial or wholly lacking any reasonable basis. The risk that the state will erroneously terminate meritorious claims is high. If Petitioners had been lucky enough to have been hit by a car driven by an association member as they watched their domicile burn, they would be able to proceed with their suit. Thus, their suit is not dismissed because of the merits of their claim, but because of the type of defendant that harmed them, a

factor over which they have absolutely no control and which they cannot rectify. A rule that terminates causes of action in this wholly random fashion does not comply with the demands of due process.

Further, the only reason the Illinois courts have ever articulated for the rule that unincorporated associations cannot sue or be sued in their own name in an action in law is that that is the common law rule.[2] The common law rule, however, has no rational basis for application in the modern law.

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[2]Respondents suggested in the lower courts that the rule was designed to protect labor unions. The common law rule, however, prohibits suits by or against associations. It was a labor union, unable to enforce its contractual rights in the Illinois courts, that last attacked the common law rule. Am. Fed. of Tech. Eng'rs v. LaJeunesse, 63 Ill.2d 263, 347 N.E.2d 712 (1976). Thus labor unions have been harmed as well as helped by the common law rule.

There were two reasons for the common law rule concerning unincorporated associations. First, the early common law was a system of extraordinary fidelity to strict rules and unvarying formality. Thus, common law theory demanded that an organization be formally chartered before it could be recognized in court. If the organization did not fit into an accepted category, common law could not, and consequently, did not deal with it. Sturges, Unincorporated Associations as Parties to Actions, 33 Yale L.J. 383, 394-98 (1924). See also Dodd, Dogma and Practice In the Law of Associations, 42 Harv. L.Rev. 977, 982 (1929) (hereinafter "Dodd").[3]

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[3]The rule regarding unincorporated associations is an offshoot of the ancient maxim that no group could exist without the King's License. See E. Warren, Corporate Advantages Without Incorporation 8-11 (1929). As early as
(Footnote Continued)

The other reason for the common law rule of unincorporated associations served a dual imperial purpose. It insured revenue for the crown when groups paid for the privilege of creating and maintaining recognized organizations. Dodd, 42 Harv. L.Rev. at 983. More importantly, it kept all groups "dependent upon royal will, the sovereign had a ready means of keeping lesser groups in subordination to the state of which at that time he was the head." Id.

It is readily apparent that the reasons for the common law rule have no modern validity. The state interest in the public fisc is insufficient to overcome Petitioners' right of access to

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(Footnote Continued)
Y.B. 49 Edw. III, 3 (1375), there is a reported case that unrecognized associations could neither hold property nor be adjudicated in the law courts. The common law rule that labor unions were illegal conspiracies came out of this background.

the courts. Boddie, 401 U.S. at 382. Further, Illinois has no interest in, and cannot not constitutionally, limit or subordinate persons who lawfully associate. NAACP v. Alabama, ex. rel. Patterson, 357 U.S. 449, 460-63 (1958).

Further, the Illinois courts long ago recognized union existence and abandoned the common law rule that they were illegal conspiracies. Wilson v. Hey, 232 Ill. 389, 83 N.E. 928 (1908); Montgomery Ward & Co. v. United Employees, 400 Ill. 38, 52, 79 N.E.2d 46, 53 (1948). In addition, the Illinois Legislature has specifically recognized public employee labor unions like Respondents, and has granted them extensive privileges and responsibilities. See Ill. Rev. Stat. 1987, Ch. 48, pars. 1601, et seq. Thus, Illinois has completely departed from the common law rule that unincorporated associations in general, and labor unions

in particular, have no legal existence. In addition, Illinois has also abandoned the notion that an organization must be specifically recognized by the state before it may be sued in state court. In Maunder v. DeHavilland Aircraft, 102 Ill.2d 342, 466 N.E.2d 217, 221, cert. denied, 469 U.S. 1036 (1984), the Illinois Supreme Court held that, given sufficient minimum contacts, corporations chartered in foreign countries could be sued in the Illinois law courts for money damages under tort theories. Thus, Illinois has jettisoned all reasons for the common law rule. Nonetheless, the Illinois courts have used the rule to dismiss Petitioners' claims.[4] Denial of

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[4]The inconsistent manner in which the Illinois courts have applied the common law rule is further compelling evidence that the rule violates due process. For example, in Airline Stewards & Stewardesses Ass'n v. Quinn,

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access to the courts by application of such a baseless rule is a denial of whatever level of scrutiny this Court employs under the Due Process Clause.

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35 Ill.2d 106, 219 N.E.2d 499, 501 (1966), the Illinois Supreme Court held that the unincorporated associations rule is one of party capacity. Party capacity is generally conceded to be a procedural concept. 6 C. Wright & A. Miller, Federal Practice & Procedure: Civil sec. 1559 at 727-28 (1971). Yet the same court in this case held the same rule to be substantive. The court relied on the statement in Montgomery Ward & Co. v. Franklin Union, No. 4, 323 Ill.App. 590, 56 N.E.2d 476 (1944) holding the rule to be substantive because it went to jurisdiction. Because the common law rule can be waived, however, Franklin Union No.4 v. People, 220 Ill. 355, 77 N.E. 176, 179 (1906) and subject-matter jurisdiction cannot, Smith v. Jones, 113 Ill.2d 126, 130, 497 N.E.2d 738, 740 (1986), the court must have been speaking of jurisdiction in its procedural sense. How this was transmuted to a substantive meaning is unknown. Further, the court below found that suit could not proceed against the association, only its members. Thus the court must have found the two groups legally separate. Yet this is the antithesis of the common law rule that associations may not be sued in the common name precisely because the two groups are considered legally identical.

The sole justification articulated by the Illinois courts, enforcement of the common law rule, has no basis in either modern law or society. It is a rule that is being enforced simply because it was the rule. As Justice Holmes said, "It is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV. It is still more revolting if the rule simply persists from blind imitation of the past." Holmes, The Path of Law, 10 Harv. L.Rev. 461, 469 (1897). See also Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969) ("The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms."). This Court should grant the Writ of Certiorari to precisely enunciate the level of scrutiny applicable to claims of deprivation of access to the courts and remedy this

fundamental denial of Petitioners' rights under the Due Process Clause.

B. THE EQUAL PROTECTION CLAUSE MANDATE OF ACCESS TO THE COURTS IS VIOLATED BY THE ILLINOIS RULE.

Equal protection of the laws "prohibits prejudicial disparities before the law." Fay v. New York, 332 U.S. 261, 285 (1947). In this case, the Illinois courts have enforced a rule that arbitrarily sets up a class of organizations that are unreachable by the judicial process. In exempting this class, Illinois has denied the Petitioners access to the courts in violation of the command of the Equal Protection Clause.

There is substantial precedent for finding that the Equal Protection Clause protects the right of access to the courts. Lindsey v. Normet, 405 U.S. 56, 79 (1972); Logan v. Zimmerman Brush

Co., 455 U.S. 422, 438 (1982) (Blackmun, J.); Logan, 455 U.S. at 443 (Powell, J. conc. judg.); Boddie v. Connecticut, 401 U.S. 371, 380 (1971) (Brennan, J., conc.). In these cases, however, the Court did not discuss the level of scrutiny generally applicable, but simply found that the laws lacked basic rationality. Thus, this Court has never articulated, under the Equal Protection Clause, the level of scrutiny that is appropriate for analysis of a law that limits court access in civil cases. Petitioners assert that, because of its fundamental nature, access to the courts should receive heightened scrutiny.

The appropriate level of scrutiny depends on the nature of the right involved. The right involved in this case, access to the courts, should be considered a fundamental or quasi-fundamental right. As Justice Harlan, writing for the Court explained,

"American society ... bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute resolution [on access to the courts].... Only by providing this social enforcement mechanism ... can we hope to maintain an ordered society that is also just." Boddie v. Connecticut, 401 U.S. 371, 375 (1971). For this reason, access to the courts is essential to the preservation of civil liberty.[5] Without the courts as an independent arbiter and protector of constitutional and other legal values, most of the rest of our constitutional

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[5]In holding the right of access to the courts to be fundamental for prisoners, this Court noted that law suits "directly protect our most valued rights." Bounds v. Smith, 430 U.S. 817, 827 (1977). That interest is equally compelling for civil plaintiffs barred from vindicating their rights because of unconstitutional limitations on court access.

and legal guarantees become, as Madison stressed, unenforceable "parchment barriers."

It is through the courts, in the main, that individuals protect their life, liberty and property. In fact, a lawsuit is frequently the only way these constitutionally protected rights may be vindicated. Thus, access to the courts is closely analogous to the fundamental right to vote. Like the right to vote, court access "in a free and unimpaired manner is preservative of other basic civil and political rights, [and] any alleged infringement ... must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 562 (1964) (Reynolds). See also Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). Access to the courts, therefore, should be equated with the fundamental right to vote and thus should be accorded the same level of "'close constitutional

scrutiny.'" Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (Dunn) quoting Evans v. Cornman, 398 U.S. 419, 422 (1970). See also Harper v. Virginia Board of Elections, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

Because heightened scrutiny is appropriate for claims of denial of access to the courts, this Court must examine "the individual interests affected by the classification; and the governmental interests asserted in support of the classification." Dunn, 408 U.S. at 335. The interests of the Petitioners affected by the rule that unincorporated associations may not sue or be sued in their own name at law are obvious. The rule, by barring access to

the courts, completely and permanently deprives the Petitioners of any chance at a remedy for wrongs committed by the association.

The interest of Illinois, however, is not apparent. As this Court has said, "the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." Reynolds, 377 U.S. at 565. Neither the courts of Illinois nor the Respondents have ever postulated a reason why the Illinois courts close their doors to lawsuits concerning associations that clearly interact with the rest of society when those courts stand ready and open to adjudicate lawsuits of all other types of

organizations.[6] Cf. United States v. White, 322 U.S. 694, 701-03 (1944). The unincorporated associations rule simply exists in a legal and societal vacuum.[7]

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[6]To the extent that the Illinois rule allows any suits against unincorporated associations, only very small associations would be able to sue or be sued under the rule. Why Illinois should favor small associations with access to the court system is a mystery with no apparent solution.

[7]Further, to the extent the Illinois rule could be read as an absolute immunity for unincorporated associations, it should be evaluated under the criteria this Court has developed for the application of common law immunities. This Court has made clear such immunities are to be judged by the functions they serve and protect, and not to whom the immunity attaches. Forrester v. White, 98 L.Ed.2d 555, 563, 565 (1988). In this regard, the Court has held that, generally, absolute immunities should attach only where it "is essential for the conduct of public business." Butz v. Economou, 438 U.S. 478, 507 (1978). Thus, at the least, an immunity must be substantially related to some important governmental purpose. There is no reasonable function served by giving every unincorporated association immunity from lawsuits. And since an unincorporated association can neither

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Illinois does not have a "compelling" rationale for its rule barring access to the courts that satisfies the demands of strict scrutiny. Nor does the rule have an "important governmental objective" that complies with the dictates of intermediate scrutiny. Craig v. Boren, 429 U.S. 190, 197 (1976). Indeed, the rule does not even seem to have a rational basis. A rule without a reason is not the type of impartial justice contemplated by the protections of the Equal Protection Clause. In this case, the Petitioners have been arbitrarily barred from the courts of Illinois. As the States adapt

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sue nor be sued in its own name at law, the converse is also true: all persons are given immunity for their wrongs to associations. Given the rule's breadth, if it is to be considered an immunity, it does not seem to be substantially or even rationally related to whatever governmental purpose there might be.

their civil systems to changes and growth in the law, this Court should grant the Writ of Certiorari to determine the appropriate level of scrutiny to laws that deny access to the court system and restore the Petitioners the right to proceed in their lawsuit for damages.

II. THE COMMON LAW RULE DENIES PETITIONERS THEIR RIGHTS UNDER THE FEDERAL BILL OF RIGHTS.

A. THE PETITIONERS HAVE BEEN DENIED THEIR RIGHT TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT.

1. The Petitioners would qualify for a Jury Trial but are deprived of that opportunity by the Illinois rule.

The Seventh Amendment fashions a federal policy in favor of jury determinations of disputed fact questions. A. & G. Stevedoers v.

Ellerman Lines, 369 U.S. 355, 360 (1962). Thus, this Court has declared that

> With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 485-86 (1935). Even cursory examination of this cause and the Illinois law demonstrates that Petitioners have the right to a jury trial but that Illinois law denies them any opportunity to ever receive a jury determination.

In Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970), this Court enunciated a three-part test for determining the applicability of a jury trial: custom in the courts before the merger of law and equity, the remedy sought, and the

practical abilities and limitations of juries. Except for Illinois' archaic common law rule, Petitioners would enjoy the opportunity of a jury trial.

First. The underlying suit in this case sounds in the common law areas of tort and contract. Thus, it is quintessentially the type of suit that this Court frequently has held is not only eligible for, but is best determined by a jury. Cf. Scott v. Neely, 140 U.S. 106, 110-11 (1891). A personal injury suit, like the instant case, is the easiest and most compelling case for the application of a constitutional guarantee for the opportunity for a jury trial. James, Right to A Jury Trial in Civil Actions, 72 Yale L.J. 654, 668-69 (1963). Petitioners case would have been heard by a jury in 1791 or 1868 and should be heard by one today.

Second. This suit seeks money damages based on common law theories of

liability. No other relief is sought. This Court repeatedly has held that a claim for money damages is the most important and the most certain indicator of a suit at law that qualifies for a jury trial under the Seventh Amendment. Tull v. United States, 95 L.Ed.2d 365, 375 (1987); Lorillard v. Pons, 434 U.S. 575, 583 (1978); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962); Whitehead v. Shattuck, 138 U.S. 146, 151 (1891).

Third. A traditional common law tort and contract action, such as presented by this case, is well within the competence of a jury to consider. This is the type of action that civil juries have been successfully deciding for centuries. Further, this Court has noted that tort and contract liability are precisely the types of cases where juries are most useful and most adept at fact finding. See, e.g., Schulz v. Pennsylvania Railroad Co., 350 U.S. 523,

525-26 (1956). Petitioners, requesting money damages under tort and contract principles, seek and should have, the opportunity for access to a jury trial.

The Petitioners' suit would clearly qualify for a jury trial under this Court's Seventh Amendment test.[8] However, the common law rule regarding unincorporated associations makes it functionally impossible to receive a jury trial. This Court stated nearly ninety years ago that, "'a violation of the

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[8]The fact that this common law rule was in existence at the time the Amendment was ratified is irrelevant in determining whether the Petitioners' Seventh Amendment rights have been violated. In Galloway v. United States, 319 U.S. 372, 394 (1943), this Court held that the common law methods of challenge are not "enshrined" in the Seventh Amendment. In fact, old rules may need to be discarded and new ones developed to preserve the substance of the right to trial by jury that the Seventh Amendment protects. Ex Parte Peterson, 253 U.S. 300, 310 (1920); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

trial by jury, [occurs if the right is subjected] ... to unreasonable and burdensome regulations, which, if they do not amount to a literal prohibition, are, at least, virtually of that character.'" Capital Traction Company v. Hof, 174 U.S. 1, 27 (1899) quoting Beers v. Beers, 4 Conn. 535, 539 (1823). Thus, the rule in this case is unlike other other restrictions this Court has found to be constitutional under the Seventh Amendment, such as directed verdicts, summary judgment and judgment non obstante verdicto. Under the Illinois rule, no matter what the facts are, no matter what the law is, Petitioners are unable to do anything that will ever give them the opportunity for access to a jury. Thus, they will never have any opportunity to even attempt to present facts to a jury or receive the beneficent

protections of the Seventh Amendment.[9] In a suit at law, such as this case, the right to have a jury pass on facts is fundamental. Slocum v. New York, 228 U.S. 364, 385 (1913) (Slocum) quoting Hodges v. Eaton, 106 U.S. 408, 412 (1882); Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U.S. 494, 498 (1931). The Petitioners are absolutely denied this fundamental right with absolutely no manner in which to avoid the deprivation in violation of the Seventh Amendment.

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[9]The Seventh Amendment provides for more than a group of people in a courtroom. For example, that Amendment, like its Sixth Amendment cousins, also protects the right to confront, cross-examine and impeach witnesses. Adickes v. Kress & Co., 398 U.S. 144, 176 (1970) (Black, J., conc. judg.). Under the Seventh Amendment, both court and jury are essential features. Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U.S. 494, 498 (1931); Slocum v. New York, 228 U.S. 364, 382 (1913).

2. The Seventh Amendment ought to be applied to the States.

The Petitioners assert that the the first clause of the Seventh Amendment[10] should apply to the States to protect the right to a civil jury trial in a suit at common law. Since the advent of modern due process incorporation, this Court apparently has never granted plenary review to determine the applicability of the first clause of the Seventh Amendment to the States.[11] As the States tinker

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[10]This Court long ago held that the two clauses of the Seventh Amendment are independent and may be considered separately. The Justices v. Murray, 76 U.S. (9 Wall.) 274, 277 (1869).

[11]Even in the case most frequently cited for the proposition that the Seventh Amendment does not apply to the States, Minneapolis & St. Louis Railroad Co. v. Bombolis, 241 U.S. 211, 217 (1916), incorporation was not a central issue. Rather, Bombolis was fundamentally presented and decided on whether, because of federal statutory policy, the Seventh Amendment applied to Congressionally created causes of actions

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with their civil dispute system in response to litigation growth, this Court should determine whether the right to a civil jury trial applies to the States.

For over ninety years, this Court has found that one of the many facets of the Due Process Clause of the Fourteenth Amendment is the selective incorporation of many parts of the first eight amendments to the Constitution. This is because "the Fourteenth Amendment 'embraced' those "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" even though they had been

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enforced in the state courts. Even if this was not true, this Court should still grant Certiorari because "[t]he Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." Malloy v. Hogan, 378 U.S. 1, 5 (1964).

'specifically dealt with in another part of the federal constitution.'" Gideon v. Wainwright, 372 U.S. 335, 341 (1963) quoting Powell v. Alabama, 287 U.S. 46, 67 (1932) quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926). For this reason, this Court has held that a portion of the Bill of Rights is applicable to the States if it is "'fundamental to the American scheme of Justice.'" Benton v. Maryland, 395 U.S. 784, 794 (1969) quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

As the Chief Justice has stated, "The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence." Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting). This is because "[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a

safeguard too precious to be left to the whim of the sovereign, or it might be added, to that of the judiciary." Id. at 343. History, judicial practice, and the precedents of this Court have validated the Chief Justice's judgment that civil juries are a central and fundamental cornerstone of American civil liberty.

This Court has repeatedly held that the concept of "Due Process" includes the fundamental rights historically enjoyed by Englishmen. Ingraham v. Wright, 430 U.S. 651, 672-73 (1977); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855). For this reason, early English law is persuasive evidence that a right is fundamental and should be incorporated. See, e.g., Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967).

At the time the Seventh and Fourteenth Amendments were adopted, the right to a civil jury trial in law cases

was virtually absolute. Indeed, until the middle of the nineteenth century, jury trials were the only method of proceeding for nearly every suit in the English law courts. Only with the passage of the Common Law Procedure Act, 17 & 18 Vict., ch. 125 (1854), did a bench trial become an option in the British law courts. Even when Parliament adopted a modern system in which litigants generally had to request a civil jury trial, the right, once requested, was absolute. Statute Law Revision and Civil Procedure Act, 46 & 47 Vict., ch. 49 (1883). Thus, William Blackstone, who greatly influenced the development of American law in general and the founders in particular, Reid v. Covert, 354 U.S. 1, 26 (1957), stated, "Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of English law. It is the most transcendent privilege

which any subject can enjoy, or wish for...." 3 Wm. Blackstone, Commentaries on the Laws of England 379 (1763).

Blackstone's and the English law's enthusiasm for civil jury trials were carried into this country. "[I]n general this venerable and highly popular institution was adapted in the colonies in its English form at an early date." Reinsch, The English Common Law in the Early American Colonies in 1 Select Essays in Anglo-American Legal History 412 (1907). As the Revolution approached, the right to a jury trial took on special importance for the founders of our country. For example, the Stamp Act Congress of 1765 declared that trial by jury was an inherent and inviolate right of every colonist. R. Perry & J. Cooper, Sources of Our Liberty 270 (1959). Nine years later, the First Continental Congress resolved that one of the inalienable rights the inhabitants of

America possessed as Englishmen was the right to trial "by their peers of the vicinage, according to the course of that [common] law." Declaration and Resolves of the First Continental Congress October 14, 1774, No. 5, reprinted in Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. 1, 3 (1927) (hereinafter "Documents"). This theme was picked up twice by the Second Continental Congress in the events that led to the American Revolution. In calling for the creation of a Continental Army to repel the British, Congress listed the deprivation of the right to trial by jury as an intolerable injustice visited upon this country by British colonial policy. Declaration of the Causes and Necessity of Taking Up Arms, July 6, 1775. Documents at 12. Finally, in proclaiming American Independence, Congress, speaking through the words of

Thomas Jefferson, listed as one of the "repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States" the curtailment "of the benefits of Trial by Jury." The Declaration of Independence. Documents at 23-24.[12]

The break with Britain did not end the founders' concern for the right of trial by jury. All of 13 of the States

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[12]The importance of trial by jury was a point Jefferson was to return to throughout his career. For example, in his first Inaugral Address (1801), he listed the right to trial by jury as one of the basic principles of a republic along with freedom of religion, freedom of the press, and the supremacy of civil authority over the military. 3 The Writings of Thomas Jefferson (mem. ed. 1903) (A. Lipscomb, ed.) (hereinafter "Jefferson Writings"). Similarly, in speaking of the need for a Federal Bill of Rights, Jefferson said that the right to a jury trial was one of the "instruments for administering the government, so peculiarly trust-worthy, that we should never leave the legislature at liberty to change them." 7 Jefferson Writings at 323.

provided for the protection of civil jury trials soon after Independence was declared. Parklane Hosiery, 439 U.S. at 343 (Rehnquist, J., dissenting). The right to a civil jury trial was one of the few guarantees that all of the States in the early American Republic agreed upon. 15 Jefferson Writings at 489. In fact, every state, at the time it either entered the Union or ratified the Fourteenth Amendment had some form of guarantee for the right of civil jury trials. See Bartkus v. Illinois, 359 U.S. 121, 141-49 (1959).

Preservation of the right to a civil jury trial was not only a concern of the states. It has always been a fundamental feature of Federal law. Jacob v. New York, 315 U.S. 752, 752 (1942) (Jacob). For example, the Confederation Congress guaranteed the right to trial by jury to persons residing in the federal territories. An Ordinance for the

Government of the Territory of the United States north-west of the river Ohio, Art. II, reprinted in An Act to provide for the Government of the Territory North-west of the River Ohio, Ch. 8, 1 Stat. 50, 51 n.a (1789). The First Congress, which reenacted the Northwest Ordinance of 1787, id., and proposed the Bill of Rights, including the Seventh Amendment, also demonstrated its independent concern for the protection of civil jury trials. In setting up the federal court system, Congress mandated that except for equity and admiralty cases, all civil trials "shall be by jury." An Act to establish the Judicial Courts of the United States, Ch. 20, sec. 9, 1 Stat. 73, 77 (1789).

This concern for a federal guarantee of civil jury trials is also manifested in the events that led to the adoption of the Seventh Amendment. The lack of a civil jury guarantee was considered to be

one of the fundamental defects of the Constitution. Slocum, 228 U.S. at 377; Chicago, Burlington and Quincy Railroad Company v. Chicago, 166 U.S. 226, 243 (1897). For example, all of the states that ratified the Constitution with the demand for a Bill of Rights included proposals for the preservation of civil jury trials. Documents at 1019 (Massachusetts), 1026 (New Hampshire), 1029 (Virginia), 1036 (New York), 1046 (North Carolina), 1054 (Rhode Island). Thus, when ratified, the Seventh Amendment "received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people." Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 445 (1830) (Parsons).

The Seventh Amendment guarantee of the right of an opportunity of a civil jury trial has always been closely linked to the fundamental Sixth Amendment right

to a criminal jury trial. For example, Justice Story stressed that the Seventh Amendment "is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." 3 J. Story, Commentaries on the Constitution of the United States sec. 1762 at 633 (1833). Following Justice Story's analysis, this Court has frequently equated the demands of criminal and civil juries. See, e.g., Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946) (Thiel).

In 1968, this Court made the Sixth Amendment jury trial guarantee applicable to the States in Duncan v. Louisiana, 391 U.S. 145 (1968). After reviewing a history very similar to the one set out

above, the Court concluded that "[e]ven such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice...." Id. at 153. Like Duncan, this Court's precedents and continued legal support for civil juries validates the conclusion that the right to a civil jury trial is fundamental and should be made applicable to the States.

The demands of the Seventh Amendment are an imperative of the American legal system. Hepburn v. Wolcott 37 U.S. (12 Pet.) 345, 375-76 (1838). For this reason, this Court has stated that " the Trial by jury is justly dear to the American people" and should be guarded by the Court with jealousy. Parsons, 28 U.S. (3 Pet.) at 445; Baylis v. Travellers' Insurance Company, 113 U.S. 316, 321 (1880) (and cases cited therein). The reason for this importance

is clear and simple. The right to trial by jury memorialized in the Seventh Amendment is "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the principles of private right and distributive justice," Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 246 (1819). In addition, the civil jury is an integral and essential part of our "democratic ideals". Thiel, 328 U.S. at 220. As "that perceptive commentator on our country," Davis v. Bandemer, 478 U.S. 109, 143 (1986) (Burger, C.J., conc. judg.), Alexis de Tocqueville stated,

> The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage....When ... the jury acts also on civil causes, its application is constantly visible, it affects all the interest of the community ... it fashions the human mind to its particular forms, and is gradually associated with the idea of justice itself.

A. de Tocqueville, Democracy in America 283-84 (Knopf ed. 1948).

In American history and in American jurisprudence, trial by jury in civil cases, like trial by jury in criminal cases, serves at least two fundamental societal goals. It safeguards the rights of the individual, preventing justice from being denied or misapplied, by protecting a person from possible oppression by government officials. Further, it enhances democratic government by bringing the citizen directly into the process of governing, thus validating our legal systems. Duncan, 391 U.S. at 155-58; Green v. United States, 356 U.S. 165, 214-16 (1958) (Black, J., dissenting). As de Tocqueville recognized, it is through "the jury in civil causes that the American magistrates imbue even the lower classes of society with the spirit of their profession. Thus the jury, which

is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well." Democracy in America at 287.

Access to the civil jury continues to be a central theme in modern American legal thought. For example, the 1977 Annual Chief Justice Earl Warren Conference on Advocacy in the United States, after a thorough examination of the area, was "vigorously against erosion or dilution" of the right to trial by jury in civil cases. Final Report: The American Jury System 17 (1977). The conference found that, when properly instructed, the jury helps filter out and counterbalance any judicial bias and brings "a freshness of mind" to the judicial process. Id. at 18-19. The conference further found that the jury has a value in representing the community's mores and giving its citizens a feeling of participation in government

more direct even than voting. Id. at 19. Finally, like this Court, the conference found that the civil jury stands between the citizen and government abuse of power. Id. When the conference revisited this area nine years later, it reaffirmed its prior finding of "the central importance of the civil jury in the success of the American democratic structure, by its ongoing reflection of prevailing community concerns and standards in the application of the law to the particular circumstances of individual litigants." Final Report of the 1986 Chief Justice Earl Warren Conference on Advocacy in the United States: The American Jury at x, 89 (1987).[13]

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[13]This concern is mirrored in the opinions of judges throughout the United States. A poll conducted in late 1987 by Louis Harris and Associates of 200

(Footnote Continued)

Today, trial by jury in civil cases plays the same roll and addresses the same institutional needs that it played for the founders. Cf. J. Goebel, The History of the Supreme Court of the United States: Antecedents and Beginnings to 1801 86-87 (1971). In addition, both Anglo-American history and the decisions of this Court strongly indicate that the right to a civil jury trial is fundamental. This is highlighted by this Court's recent decision in Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983). In that case, the Court noted that there is a fundamental First Amendment right of petition to state

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(Footnote Continued)
federal and 800 state trial court judges who spend at least half their time on general civil cases found that "the great majority of judges are strongly committed to the jury system and tend to oppose almost all the suggestions for changes in the jury system." Judges' Opinions on Procedural Issues 76 (1987).

courts for the redress of grievances. Significantly, the Court went on to determined that this right gave the state court plaintiff an "interest in having the factual disputes resolved by a jury...." Id. at 745. Equating the First Amendment right of petition and the interest in a jury determination in this way is final compelling proof that the right of opportunity to a civil jury trial is fundamental and should (like the First Amendment right of petition) be made applicable to the States.

In speaking of the right to a civil jury trial this Court has stated that under the Seventh Amendment, "the function assigned to the jury 'is an essential factor in the process for which the Federal Constitution provides.'" Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 539 quoting Herron v. Southern Pacific Co., 283 U.S. 91, 95 (1931). Because the

access to a civil jury is such an essential part of the design of the Constitution, this Court has emphasized that "[a] right so fundamental and sacred to the citizen ... should be jealously guarded by the courts." Jacob, 315 U.S. at 752-53. For this reason, there are special and important reasons for the grant of a Writ of Certiorari when state courts enforce rules that persistently deprive litigants of their right to a jury trial. Rodgers v. Missouri Pacific Railroad Co., 352 U.S. 500, 510 (1957).

In this case, it is clear that the Illinois rule deprives the Petitioner of any chance of receiving the protections of a determination by jury. Further, the same factors that impelled this Court to determine that the Sixth Amendment right to a criminal jury trial in Duncan is fundamental and an obligation on the States are also at work in the Seventh Amendment right to a civil jury trial.

For these reasons, Petitioners respectfully request that the Writ of Certiorari be granted and that Petitioners be given the opportunity to exercise their right to a jury trial in the courts of Illinois.

B. THE ILLINOIS COMMON LAW RULE DENIES THE PETITIONERS THEIR RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF INJURIES GUARANTEED BY THE FIRST AMENDMENT.

This Court has held that the right "to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights." United Mine Workers of America, District 12 v. Illinois State Bar Association, 389 U.S. 217, 222 (1967) (United Mine Workers). Because a law suit is frequently the only practical way in which burdens on individuals can be resolved, NAACP v. Button, 371 U.S. 415, 429 (1963) (Button), this Court has held

that the First Amendment right to petition the government for redress encompasses the "right to have genuine state-law legal questions decided by the state judiciary [and state juries]." Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745-46 (1983). This Court has never precisely defined the contours of the First Amendment right of access to the courts. It is clear, however, that at a minimum the First Amendment, like the Due Process and Equal Protection Clauses of the Fourteenth Amendment, guarantees "free and meaningful access to the ... courts...." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972).

The Right of Petition, like the rest of the fundamental rights guaranteed by the First Amendment, demands that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate

can justify limiting First Amendment freedoms." Button, 371 U.S. at 438. As the Court has explained,

> The First Amendment would... be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil because the laws do in fact provide a helpful means of dealing with such an evil.

United Mine Workers, 389 U.S. at 222.

In enforcing the ancient common law rule that unincorporated associations cannot sue or be sued in their own name at law, the Illinois courts have set up a regime that leaves the Petitioners without hope for any hearing or remedy. This is because the rule arbitrarily denies the existence of the association for the purposes of prosecution of a suit. Artificially deprived of a party against whom it can seek damages,

Petitioners are unable to prosecute a suit in the Illinois courts. That is, they have no right to be in court because, they have, in theory, sued something that does not exist. This is not just a denial of meaningful access to the courts. It is a denial of all access to courts.

The Illinois courts and the Respondents have not offered any reasons, let alone any compelling reasons for this deprivation of access to the judicial system. The courts of Illinois have arbitrarily turned a deaf ear to Petitioners cries for justice. This Court should grant this Petition for a Writ of Certiorari to precisely describe the scope of the First Amendment Right of Petition to the state courts and secure to the Petitioners their fundamental rights of access to the court system for an impartial decision according to reasoned principle.

III. CONCLUSION

For all of the foregoing reasons Petitioners respectfully request this Honorable Court grant the Petition for a Writ of Certiorari and reverse the decision of the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Illinois 62706
(217) 782-2035

May 31, 1988

Nos.63713 - April Rivard, et al., etc.,
63787 appellees, v. Chicago
Cons. Firefighters Union, etc., et al., appellants.
Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above titled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 10, 1988.

Docket Nos. 63713, 63787 cons.—Agenda 21—March 1987.

APRIL RIVARD *et al.*, Appellees, v. CHICAGO FIREFIGHTERS UNION, LOCAL NO. 2 *et al.*, Appellants.—BONNELL CARTER, Adm'r of the Estates of Martha Carter *et al.* v. CHICAGO FIREFIGHTERS UNION, LOCAL NO. 2 *et al.* (International Association of Firefighters, AFL-CIO, Appellant).

JUSTICE CLARK delivered the opinion of the court:

This case poses the issue of whether a statute allowing voluntary, unincorporated associations to sue and to be sued in their own names should be retroactively applied to a suit against such an association where the cause of action arose before the statute's effective date. We answer this question in the negative.

The plaintiffs in the two actions consolidated below sought damages from the defendant, a firefighters union, for death and injuries suffered in fires which occurred during a strike called by the union in 1980. The plaintiffs are: April Rivard; Robert Oliver, administrator of the estate of Latrice Louis Rivard, deceased; Bonell Carter, administrator of the estates of Martha Carter, Caenezell Carter, Harvey Carter, and Henry Carter, deceased; and Harvey and Martha Teague, administrators of the estate of Harvey Teague II, deceased. The defendants are the Chicago Firefighters Union, Local No. 2, and the International Association of Firefighters, AFL-CIO, and certain of its officers in a representative capacity. The circuit court granted the defendant's motion to dismiss on the grounds that, under the common law, a voluntary unincorporated association could not be sued in its own name in an action at law. (See *American Federation of Technical Engineers, Local 144 v. La Jeunesse* (1976), 63 Ill. 2d 263.) The plaintiffs appealed to the appellate court. While the appeal was pending, the General Assembly amended the Code of Civil Procedure to allow voluntary unincorporated associations to sue

and be sued in their own names (Ill. Rev. Stat. 1985, ch. 110, par. 2—209.1). The appellate court, holding that section 2—209.1 should be applied retroactively, then reversed. (145 Ill. App. 3d 207.) This decision directly conflicted with a previous decision of the appellate court. (See *Brucato v. Edgar* (1984), 128 Ill. App. 3d 260.) We granted the defendant's petition for leave to appeal (107 Ill. 2d R. 315 (a)).

The remainder of the facts pertinent to this appeal are contained in the legislative history of section 2—209.1.

The bill which enacted section 2—209.1, Public Act 83—901, was originally passed by both houses of the General Assembly with no dissenting votes. It was then presented to the Governor.

On September 19, 1983, the Governor amendatorily vetoed the bill. (See Ill. Const. 1970, art. IV, §9(e).) His amendatory veto recommended that section 2—209.1 should be prospective rather than retroactive, that its prospective nature should be clearly stated in that statute itself, and that it should "apply only to causes of action accruing after the effective date of this Amendatory Act of 1983," or January 1, 1984.

Shortly thereafter, both houses of the General Assembly voted to override the Governor's amendatory veto. Senator Bloom, the author, chief sponsor, and a member of the judiciary committee that reported the bill, stated that the bill:

> "would allow voluntary associations to sue and be sued. By his amendatory veto, [the Governor] made it prospective in application, and what it does, it harms a large class of persons by excluding worthy suits, and *** arbitrarily killing some pending cases; and it creates another undesirable precedent in that 581 is clearly procedural in nature *** in fact it doesn't create or delete any legal rights but does create procedures making that preexisting right to litigate available to all members of society including these associations." (83d Ill. Gen. Assem., Senate Proceedings, October 20, 1983, at 35-38.)

Senator Bloom went on to note that:

> "Similar laws in other states have regularly been interpreted to be retrospective, and that is the overwhelming majority rule. By his amendatory veto making it prospective, it excludes large classes of worthy people and absolutely *** throws the crimp into several pending cases ***. And that affects existing litigants, and that is why, after consulting with various legal experts, I'd go for the total override to go with the bill as it was recommended by the Illinois Supreme Court." (83d Ill. Gen. Assem., Senate Proceedings, October 20, 1983, at 35-38.)

(It should be noted parenthetically that this was not an accurate statement of the official position of the court. While the court has recommended legislative action to abrogate the common law rule in every year from 1976 until the statute was passed (see 1978 Report of the Chief Justice to the General Assembly (Ill. Const. 1970, art. VI, §17), reprinted in Administrative Office of the Illinois Courts, 1978 Annual Report to the Supreme Court of Illinois 119; 1979 Report of the Chief Justice to the General Assembly, reprinted in Administrative Office of the Illinois Courts, 1979 Annual Report to the Supreme Court of Illinois 17; 1980 Report of the Chief Justice to the General Assembly, reprinted in Administrative Office of the Illinois Courts, 1980 Annual Report to the Supreme Court of Illinois 21; 1981 Report of the Chief Justice to the General Assembly, reprinted in Administrative Office of the Illinois Courts, 1981 Annual Report to the Supreme Court of Illinois 21), the court has taken no official position on whether the change should be prospective or retroactive.)

In the House, the House sponsor of the bill, Representative McCracken, stated:

> "I move to override the Governor's amendatory veto of 581 for the reason that the Governor has amended this procedural change in the law to apply prospectively only, even to causes of action which have already arisen but not yet been filed. That is in contravention of the historical practice of making procedural changes in the law to apply both retroactively and prospectively. This does not create any new rights under the law. It merely facilitates

the bringing of a suit and the defense of a suit relative to unincorporated associations. Essentially, it places them in the same posture as other entities under the law." 83d Ill. Gen. Assem., House Proceedings, November 1, 1983, at 26-29.

On this appeal the appellant union maintains that the statute should not be retroactively applied because: (1) the legislature did not intend the statute to have retroactive effect, (2) retroactivity, even if intended, should not be granted because it would lead to unreasonable and unjust results, and (3) retroactive application to this case would violate the constitutional separation of powers by abrogating a final judgment of the circuit court.

The principles governing our interpretation of statutes with respect to their prospective or retroactive operation have been stated a number of times. Because this case poses a difficult question with respect to these principles, we take this opportunity to review their origin and rationale.

As a general matter it is clear that prospective application of statutes is to be preferred to retroactive, or retrospective, application. This preference has existed from time out of mind. "The doctrine that legislation must be prospective in character is traceable to Coke and Bracton, who recognized it as a rule of construction founded on doctrines of natural law, and it was incorporated into American jurisprudence by the learned jurists Kent and Story." (*Orlicki v. McCarthy* (1954), 4 Ill. 2d 342, 346.) The doctrine has sometimes been treated as a constitutional restraint on legislation, and sometimes as a rule of statutory construction. 4 Ill. 2d at 346; compare 2 A. Sutherland, Statutes and Statutory Construction §41.03, at 343-45 (4th ed. 1986) (prospectivity as a constitutional limitation) with 2 A. Sutherland. Statutes and Statutory Construction §41.04, at 348-50 (4th ed. 1986) (prospectivity as a rule of statutory construction).

The preference for prospectivity is founded upon:

"[the] fundamental principle of jurisprudence that retroactive application of new laws is usually unfair. There is a general consensus that notice or warning of the rule should be given in advance of the actions whose effects

> are to be judged ***. [Jeremy] Bentham stated the case against retroactivity when he likened it to 'dog law.' He was referring to age-old method of training dogs by waiting until they do what they are to be forbidden to do and then kicking them." 1A A. Sutherland, Statutory Construction §41.02, at 340-41 (4th ed. 1985).

It has thus been our general rule of construction that an amendatory act will be construed as prospective. (*Maiter v. Chicago Board of Education* (1980), 82 Ill. 2d 373, 390; *Orlicki v. McCarthy* (1954), 4 Ill. 2d 342, 346.) The presumption of prospectivity is rebuttable, but only by the act itself. Either by express language or necessary implication, the act must clearly indicate that the legislature intended a retroactive application. *People v. Kellick* (1984), 102 Ill. 2d 162, 180; *United States Steel Credit Union v. Knight* (1965), 32 Ill. 2d 138, 142.

We agree with the appellants that the presumption of prospectivity cannot ordinarily be rebutted merely by contrary statements of individual legislators during legislative debates. Since no statute will violate the Constitution merely because it operates prospectively, prospectivity is to be preferred. Relying on statements in the legislative history might create constitutional defects in legislation that might not otherwise exist. Nor can we agree with the appellees that the cases cited above are outdated.

It is true, however, that the presumption of prospectivity does not apply to changes in procedure or remedies. When a change in the law changes procedure alone, it will be construed as retroactive so long as that is what the legislature intended. (*Maiter v. Chicago Board of Education* (1980), 82 Ill. 2d 373, 390; *Orlicki v. McCarthy* (1954), 4 Ill. 2d 342, 346.) If the change is procedural, legislative intent may be divined through any of the ordinary devices of statutory interpretation. These include: (1) the evil to be remedied and the object to be obtained, (2) the reason and necessity for the statute, and (3) the history of the legislation. (*Barr v. Kelso-Burnett Co.* (1985), 106 Ill. 2d 520, 527.) The record of the legislative debates, and more particularly statements by

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the sponsors of the legislation, for part of the legislative history. *Finish Line Express, Inc. v. City of Chicago* (1978), 72 Ill. 2d 131, 136.

Thus the initial question here is whether section 2—209.1 is procedural. We have noted before that the line between "substance" and "procedure" may often be unclear. (*Orlicki v. McCarthy* (1954), 4 Ill. 2d 342, 348 ("no simple formula can be evolved as to when an amendment relates to a procedural, or to a substantive right").) In general, procedural law is " '[t]hat which prescribes the method of enforcing rights or obtaining redress for their invasion; machinery for carrying on a suit.' " (*People v. Ruiz* (1985), 107 Ill. 2d 19, 22, quoting Black's Law Dictionary 1367 (4th ed. 1951).) Substantive law, in contrast, establishes the rights whose invasion may be redressed through a particular procedure. More specifically, procedure embraces "pleading, evidence and practice. Practice means those legal rules which direct the course of proceedings to bring parties into court and the course of the court after they are brought in." *Ogden v. Gianakos* (1953), 415 Ill. 588, 596.

While the application of these tests is not easy, we believe that the law governing the suability of unincorporated associations is fairly characterized as substantive.

Whatever the original intention of the common law rule, it is clear that it had the practical effect of extinguishing causes of action by or against unincorporated associations as collective entities. Stating the matter in another way, injured parties under the common law rule enjoyed no rights *vis-a-vis* unincorporated associations. They only enjoyed rights against the members of such associations. Thus the common law rule, and its statutory alteration, are substantive.

The distinction between this statute and a truly procedural statute is underlined by a consideration of the facts of *Ogden v. Gianakos* (1953), 415 Ill. 591. In *Ogden* the statute under consideration allowed persons injured in Illinois to obtain jurisdiction over nonresident motorists by serving process upon the Secretary of State. The

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court held that "[t]he statute in question is certainly not part of the law which creates, defines, or regulates rights. *** *The issue or service of process is not what makes one a party to a suit.* It is merely a step in obtaining jurisdiction of his person after he is a party to a suit." (Emphasis added.) 415 Ill. at 596.

Thus, a rule which "makes one a party to a suit" must be considered substantive, whereas a rule which merely facilitates suit against a party is procedural. Section 2—209.1 does make certain entities, unincorporated associations, parties to suits. It is not merely a procedural step needed for the acquisition of jurisdiction over them.

Finally, we note that our appellate court has previously held that the common law rule was substantive, specifically declining to abrogate it on that ground. (*Montgomery Ward & Co. v. Franklin Union, Local No. 4* (1944), 323 Ill. App. 590, 593.) Moreover, our court as recently as *American Federation of Technical Engineers, Local 144 v. La Jeunesse* (1976), 63 Ill. 2d 263, 266, has refused to change the common law rule without legislative action, thus implicitly acknowledging its substantive nature.

Since the statute is substantive, the presumption of prospectivity cannot be overcome merely by the statements of the legislation's sponsors. Since the clear language of the act and its effective date point to a prospective application, it will be so applied.

Since we resolve the case upon this ground, it is not necessary to determine whether retroactive application in this instance would unfairly defeat *bona fide* expectations or whether it would unconstitutionally abrogate a final judgment of the circuit court. For the reasons stated, the judgment of the appellate court is reversed and that of the circuit court affirmed.

Appellate court reversed;
circuit court affirmed.

JUSTICE CUNNINGHAM took no part in the consideration or decision of this case.

APRIL RIVARD *et al.*, Plaintiffs-Appellants and Cross-Appellees, v. CHICAGO FIREFIGHTERS UNION, LOCAL No. 2 *et al.*, Defendants-Appellees.—BONNELL CARTER, Adm'r of the Estates of Martha Carter, Caenezell Carter, Harvey Carter and Henry Carter, Deceased, *et al.*, Plaintiffs-Appellants and Cross-Appellees, v. CHICAGO FIREFIGHTERS UNION, LOCAL No. 2 *et al.*, Defendants-Appellees (International Association of Firefighters, AFL-CIO, Defendant-Appellee and Cross-Appellant).

First District (3rd Division) Nos. 82—3094, 82—3130, 84—1283 cons.

Reversed and remanded.

Opinion filed June 4, 1986.

1. ASSOCIATIONS (§13)—*change in statute concerning suits against unincorporated associations deemed procedural.* Statutory changes which permit unincorporated associations to sue or be sued in their own names, rather than in names of all their members, are viewed as matter of procedural convenience.

2. LABOR (§78)—*change in statute concerning suits against unincorporated associations does not create new rights.* Statutory provision that voluntary, unincorporated associations may sue and be sued in their own names is procedural and does not create new rights and obligations that did not exist previously (Ill. Rev. Stat. 1985, ch. 110, par. 2—209.1).

3. STATUTES AND RESOLUTIONS (§215)—*whether amendment is to be applied retroactively is matter of legislative intent.* Determination whether statutory amendment is to be applied retroactively or prospectively is primarily question of legislative intent.

4. LABOR (§78)—*complaints seeking damages for deaths in fires during strike by firefighters' union improperly dismissed on ground association could not be sued in its own name.* Trial court erred when it dismissed plaintiffs' complaints seeking compensatory and punitive damages for deaths and injuries suffered in fires which occurred during strike called by firefighters union, since amendment to statute allowed voluntary unincorporated associations to sue and be sued in their own names and was to be applied retroactively to instant litigation, where statute was procedural in nature, creating no new rights or liabilities, thereby precluding any injustice by retroactive application (Ill. Rev. Stat. 1985, ch. 110, par. 2—209.1).

5. CONSTITUTIONAL LAW (§48)—*separation of powers doctrine was not violated by retroactive application of statute allowing unincorporated associations to be sued in their own names.* Retroactive application of statute providing that voluntary unincorporated associations may sue or be sued in their own names did not violate separation of powers doctrine, based upon such application of statute to lawsuit for injuries and deaths which occurred while firefighters union was on strike, since legislature intended that stat-

ute be applied retrospectively and decision of trial court regarding application of statute was subject to review on appeal (Ill. Rev. Stat. 1985, ch. 110, par. 2—209.1).

6. APPEAL AND REVIEW (§830)—*appeal regarding conversion of limited appearance to general appearance was moot.* In action brought by plaintiffs against firefighters union for injuries and deaths which occurred while union was on strike, union's appeal regarding conversion of its special and limited appearance by court to general appearance was rendered moot, since statute providing that voluntary, unincorporated associations could sue or be sued in their own names was applied retroactively to litigation, precluding dismissal of lawsuit (Ill. Rev. Stat. 1985, ch. 110, par. 2—209.1).

Appeal from the Circuit Court of Cook County; the Hon. Thomas O'Brien, Judge, presiding.

Gerald M. Sachs & Associates, Ltd., of Chicago (Roger H. Williams and Tom Forgue, of counsel), for appellants April Rivard and Robert Oliver.

Gordon & Gordon, Ltd., of Chicago (Robert Langendorf, of counsel), for other appellants.

Asher, Pavalon, Gittler, Greenfield & Segall, Ltd., of Chicago, and Mulholland & Hickey, of Washington, D.C. (Michael S. Wolly and Joel A. D'Alba, of counsel), for appellee International Association of Firefighters.

Cornfield & Feldman, of Chicago (J. Dale Berry and Gilbert Feldman, of counsel), for other appellees.

JUSTICE McGILLICUDDY delivered the opinion of the court:

Plaintiffs, April Rivard, Robert Oliver, administrator of the estate of Latrice Louis Rivard, deceased, and Bonnell Carter, administrator of the estates of Martha Carter, Caenezell Carter, Harvey Carter and Henry Carter, deceased, and Harvey Teague and Martha Teague, as administrators of the estate of Harvey Teague, II, deceased, appeal from two orders of the circuit court of Cook County granting the motions to dismiss filed by the defendants, Chicago Firefighters Union, Local No. 2 (Local No. 2), International Association of Firefighters, AFL-CIO (International) and certain of their officers in a representative capacity. The plaintiffs filed two separate complaints seeking compensatory and punitive damages for deaths and injuries suffered in fires which occurred during a 1980 strike called by Local No. 2 against the city of Chicago. The actions were consolidated for defend-

ants' motions to dismiss.

The trial court granted Local No. 2's motion to dismiss on the ground that at common law, a voluntary unincorporated association cannot be sued in its own name or in a representative capacity in an action at law. (*American Federation of Technical Engineers v. La Jeunesse* (1976), 63 Ill. 2d 263, 347 N.E.2d 712.) Defendant and cross-appellant International filed a special and limited appearance, and a motion to quash service of summons and to strike complaint. The motion to quash service of summons was denied. The trial court then construed International's motion to strike the complaint as a motion to dismiss, which was granted. The court also found that International's special and limited appearance was thereby converted to a general appearance. The plaintiffs appeal the granting of defendants' motions to dismiss. International cross-appeals the conversion of its special and limited appearance to a general appearance.

While this appeal was pending, and in response to suggestions from the supreme court, the Illinois General Assembly amended the Code of Civil Procedure to allow voluntary unincorporated associations to sue and be sued in their own names. (Ill. Rev. Stat. 1985, ch. 110, par. 2—209.1.) The issue presented for review in the instant appeal is whether section 2—209.1 can be applied retroactively to affect the actions in the underlying case.

Defendants first urge us to follow *Brucato v. Edgar* (1984), 128 Ill. App. 3d 260, 470 N.E.2d 615, wherein this court held that section 2—209.1 was to be applied prospectively. The *Brucato* court based its decision on two points. First, the court found that the legislature, by allowing voluntary unincorporated associations to sue and be sued in their own names, had created new rights and obligations which did not exist previously. The court therefore held that section 2—209.1 was a substantive rather than a procedural change and could not be applied retroactively.

●1, 2 We disagree. It is true that in Illinois, the suability of voluntary unincorporated associations has traditionally been considered a substantive rather than a procedural issue. (*Montgomery Ward & Co. v. Franklin Union, Local No. 4* (1944), 323 Ill. App. 590, 56 N.E.2d 476.) A review of other jurisdictions, however, indicates that the statutory changes which permit unincorporated associations to sue or be sued in their own names rather than in the names of all their members are viewed as a matter of procedural convenience. (See, *e.g.*, *Orser v. Vierra* (1967), 252 Cal. App. 2d 660, 60 Cal. Rptr. 708; *Coleman v. Pokodner* (1957), 6 Misc. 2d 955, 163 N.Y.S.2d 161; *Hromek v. Gemeinde* (1941), 238 Wis. 204, 298 N.W. 587.) As the Supreme

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Court stated in *United Mine Workers v. Coronado Coal Co.* (1922), 259 U.S. 344, 66 L. Ed. 975, 42 S. Ct. 570:

> "[T]he suability of trades-unions *** is, after all, in essence and principle, merely a procedural matter. As a matter of substantive law, all the members of the union *** are liable to suit and recovery, and the only question is whether when they have voluntarily *** created a self-acting body with great funds to accomplish their purpose, they may not be treated as this body, and the funds they have accumulated appropriated be made to satisfy claims for injuries unlawfully caused in carrying out their united purpose." (259 U.S. 344, [illegible], 66 L. Ed. 975, 987, 42 S. Ct. 570, 576.

For this reason, we also strongly disagree with defendants' argument that section 2—209.1 creates new liabilities because the common law acted as a practical bar to suits against unions for 60 years. What is impractical or difficult is not necessarily legally impossible. We object to the characterization as substantive the procedural shield behind which unions have been protected from suit for many years.

●3 The second basis for the *Brucato* decision was the legislative history of section 2—209.1. The determination whether a statutory amendment is to be applied retroactively or prospectively is primarily a question of legislative intent. (*State Farm Mutual Automobile Insurance Co. v. Palmer* (1984), 123 Ill. App. 3d 674, 463 N.E.2d 129.) The *Brucato* court correctly noted that nothing in the statutory language or in the Historical and Practice Notes following it suggested that section 2—209.1 was to be applied retroactively. Our review of the relevant legislative history, however, indicates that Governor Thompson returned the bill in question with an amendatory veto, recommending that the provisions of the act be prospective and that its prospective nature be clearly stated in the statute. The legislature then addressed the governor's amendatory veto and the issue of retroactive application which is before this court.

Senator Bloom, the bill's sponsor, expressed his opinion that the act was clearly procedural in nature and noted that the overwhelming majority of other States have interpreted similar laws retrospectively. He then voiced his concern that should the act be applied prospectively, several pending cases would have to be dismissed and large classes of plaintiffs would be excluded from suit. The bill was then passed by the Senate, overriding the specific recommendations of the governor by a vote of 54-1-1. 83d Ill. Gen. Assem., Senate Proceedings, October 20, 1983, at 35-38.

Similarly, in the House of Representatives, Rep. McCracken

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moved to override the governor's amendatory veto because it contravened the historical practice of retroactively applying procedural changes in the law. The representative noted that the bill created no new rights under the law but merely facilitated bringing and defending suits. The bill then passed in the House of Representatives overriding the specific recommendations of the governor by a vote of 100-10-1. 83d Ill. Gen. Assem., House Proceedings, November 1, 1983, at 26-29.

●4 We are aware that even where there exists clearly expressed legislative intent that a statute be given retroactive effect, it will not be so applied when to do so would lead to unreasonable or unjust results. In *Champaign County Nursing Home v. Petry Roofing, Inc.* (1983), 117 Ill. App. 3d 76, 452 N.E.2d 847, the court stated:

> "Whether retroactive application of legislation is permissible is not dependent on such outmoded distinctions as whether vested or nonvested rights are affected, or whether a statute affects rights or merely affects remedies. Rather, such cases must be decided on the basis of whether basic concepts of justice, fairness and equity militate for or against the retroactive application of the statute to a particular class of persons. *** In applying fundamental concepts of justice, fairness and equity to the issue of whether a particular statute of limitations should be retroactively applied to a given class of individuals, the most important inquiry is whether retroactive application gives effect to, or defeats, the bona fide expectations of the members of the class. The competing interests of the affected persons must be carefully weighed in order to arrive at a just result. [Citations.]" (117 Ill. App. 3d 76, 79, 452 N.E.2d 847, 847-48.)

In the instant case we find no injustice in applying section 2—209.1 retroactively. As noted above, voluntary unincorporated associations have been artificially shielded from actions at law because the procedure of naming every member as a defendant was too unwieldy to be practical. We agree with the legislature that the procedural streamlining permitted by section 2—209.1 creates no new rights or liabilities. Moreover, as was pointed out in the legislative debates, prospective application of section 2—209.1 would require dismissal of pending cases including the instant case, a result the legislature wanted to avoid. We therefore hold that section 2—209.1 is properly applied retroactively to the litigation before us.

●5 Defendant International also objects to the retroactive application of section 2—209.1 on constitutional grounds. International maintains that the legislation at issue, if applied retroactively, changes

the effect of an order of the trial court and thus violates the doctrine of separation of powers found in both the Illinois and Federal constitutions. In *Sanelli v. Glenview State Bank* (1985), 108 Ill. 2d 1, 483 N.E.2d 226, our supreme court discussed the separation of powers issue. The court held that the General Assembly may enact retroactive legislation which changes the effect of a prior decision of a reviewing court with respect to cases which have not been finally decided. International argues that the relevant constitutional provisions do not distinguish among the various levels of the judiciary, and the legislature cannot, therefore, "overrule" even a decision of the circuit court, particularly where, as here, the circuit court decision is based on a principle of common law enunciated by our supreme court. This argument is without merit. It is well settled that every final judgment of a circuit court in a civil case is appealable as of right in Illinois. (87 Ill. 2d R. 301.) where, as in this case, an appeal is taken, the trial court's order is subject to a decision by the reviewing court and there is no separation-of-powers problem under the law as enunciated in *Sanelli*. Indeed, the separation-of-powers problem in this case will arise only if this court ignores the clearly expressed legislative intent to the contrary and holds that section 2--209.1 is to be applied only prospectively.

●6 Finally, International has appealed the conversion of its special and limited appearance to a general appearance. International contended that as a voluntary unincorporated association it was not subject to service in its common name in an action at law for money damages. We agree with the trial court that the record indicates that defendant's participation in the proceedings was more in the nature of a motion to dismiss than is permitted in a section 2—301 motion (Ill. Rev. Stat. 1981, ch. 110, par. 2—301). We find, however, that the retroactive application of section 2—209.1 renders the cross-appeal moot, and it is therefore dismissed.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and remanded for further proceedings consistent with this opinion and the cross-appeal is dismissed.

Judgment reversed and remanded; cross-appeal dismissed.

McNAMARA and WHITE, JJ., concur.

RHW:mjr #12751

STATE OF ILLINIOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

APRIL RIVARD, etal,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	NO: 82 L 4100
	)	
CHICAGO FIREFIGHTERS	)	
UNION, etal,	)	
	)	
Defendants.	)	

AGREED

AMENDED ORDER

This cause coming on to be heard as Defendant IAFF's Motion to Quash Service of Summons and to strike complaint; all parties present and argument considered by the Court;

IT IS HEREBY ORDERED:

1. Defendant, IAFF granted leave to file a Special and Limited Appearance;

2. Motion to Quash is denied and Special and Limited Appearance is construed as a general Appearance because Defendant has filed a Motion to Strike Complaint thereby attacking the pleadings;

3. Patron [sic] to Strike Complaint is granted under Section 2-619 Code of Civil Procedure;

4. That this is a final and appealable Order, the Court finding that there is no just reason to delay appeal in this cause.

5. That this Order amends and supercedes the Order of Court entered on April 3, 1984.

FURTHER THIS COURT SAYETH NOT.

Enter:

JUDGE THOMAS J. O'BRIEN

MAY 1 1984

CIRCUIT COURT - 139

_____

JUDGE

#12751

GERALD M. SACHS 7 ASSOCIATES, LTD.

Attorneys for Plaintiffs

159 North Dearborn Street

Chicago, IL 60601

332-1787

IN THE CIRCUIT COURT OF

COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, LAW DIVISION

APRIL RIVARD, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	No. 82 L 4100 B
	)	
CHICAGO FIRE FIGHTERS	)	
UNION, LOCAL NO. 2,	)	
et al.,	)	
Defendants.	)	

ORDER

This cause coming on to be heard on the Motion to Dismiss filed on behalf of

Defendants Chicago Fire Fighters Union, Local 2 (hereinafter referred to as "Local 2"), Frank Muscare, Individually and as President, William Reddy, Individually and as 1st Vice President and Frank Murphy, Individually and as 2nd Vice President, and the Court having heard arguments of counsel and being fully advised in the premises, IT IS HEREBY ORDERED THAT:

1. The Motion to Dismiss is granted as to Defendant Local 2 and the named Defendants sued in their official capacity. The Court finds that Defendant Local 2 is a voluntary unincorporated association and as such may not be sued in its own name or in a representative capacity in an action at law.

2. This order is a final and appealable order as to Plaintiffs' cause

of action against Defendant Local 2 and the named Defendants sued in their official capacity and there is no just reason for delaying enforcement or appeal.

3. It is unnecessary to reach or determine the other issues raised in the Motion to Dismiss filed on behalf of Defendants Local 2 and the named Defendants sued in their official capacity.

4. The Motion to Dismiss filed on behalf of the named Defendants sued individually will be deferred for ruling at a later date. These Defendants are directed to present their Motion for Summary Judgment and any other motions relating to the pleadings to the Court on the regular Motion Call.

Enter:

Judge Thomas J. O'Brien

November 30, 1982

CIRCUIT COURT

_____

Judge

Date: _____

J. DALE BERRY, ESQ.

CORNFIELD AND FELDMAN

343 South Dearborn Street

Chicago, Illinois 60604

(312) 922-2800

IN THE CIRCUIT COURT OF

COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, LAW DIVISION

BONNELL CARTER, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	No. 81 L 27053
	)	
CHICAGO FIRE FIGHTERS	)	
UNION, LOCAL NO. 2,	)	
et al.,	)	
Defendants.	)	

ORDER

This cause coming on to be heard on the Motion to Dismiss filed on behalf of

Defendants Chicago Fire Fighters Union, Local 2 (hereinafter referred to as "Local 2"), Frank Muscare, Individually and as President, and the Court having heard arguments of counsel and being fully advised in the premises, IT IS HEREBY ORDERED THAT:

1. The Motion to Dismiss is granted as to Defendant Local 2 and the named Defendant sued in his official capacity. The Court finds that Defendant Local 2 is a voluntary unincorporated association and as such may not be sued in its own name or in a representative capacity in an action at law.

2. This order is a final and appealable order as to Plaintiffs' cause of action against Defendant Local 2 and the named Defendant sued in his official

capacity and there is no just reason for delaying enforcement or appeal.

3. It is unnecessary to reach or determine the other issues raised in the Motion to Dismiss filed on behalf of Defendants Local 2 and the named Defendant sued in his official capacity.

4. The Motion to Dismiss filed on behalf of the named Defendants sued individually will be deferred for ruling at a later date. These Defendants are directed to present their Motion for Summary Judgment and any other motions relating to the pleadings to the Court on the regular Motion Call.

Enter:

Judge Thomas J. O'Brien

November 30, 1982

CIRCUIT COURT

_____

Judge

Date: _____

J. DALE BERRY, ESQ.

CORNFIELD AND FELDMAN

343 South Dearborn Street

Chicago, Illinois 60604

(312) 922-2800

The First Article of Amendment to the Constitution of the United States of America:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Seventh Article of Amendment to the Constitution of the United States of America:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in

any Court of the United States, then according to the rules of the common law.

The first section of the Fourteenth Article of Amendment to the Constitution of the United States of America:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Public Act 83-901 (Senate Bill No. 581) of the Eighty-Third General Assembly of the State of Illinois, approved November 1, 1983:

AN ACT to amend Section 2-102 of and to add Sections 2-205.1 and 2-209.1 to the "Code of Civil Procedure", approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois represented in the General Assembly:

Section 1. Section 2-102 of the "Code of Civil Procedure", approved August 19, 1981, as amended, is amended, and Sections 2-205.1 and 2-209.1 are added thereto, the amended and added Sections to read as follows:

Sec. 2-102. Residence of corporations, voluntary unincorporated associations and partnerships defined. For purposes of venue, the following definitions apply:

(a) Any private corporation or railroad or bridge company, organized under the laws of this State, and any foreign corporation authorized to transact business in this State is a resident of any county in which it has its registered office or other office or is doing business. A foreign corporation not authorized to transact business in this State is a nonresident of this State.

(b) A partnership sued in its firm name is a resident of any county in which any partner resides or in which the partnership has an office or is doing business. A partnership sued in its firm

name, of which all partners are nonresidents of this State and which does not have an office or do business in this State, is a nonresident of this State.

(c) A voluntary unincorporated association sued in its own name is a resident of any county in which the association has an office or, if on due inquiry no office can be found, in which any officer of the association resides. A voluntary unincorporated association sued in its own name, of which all its members are nonresidents of this State and which does not have an office or do business in this State and which does not have an office or do business in this State, is a nonresident of this State.

(Ch. 110, new par. 2-205.1)

Sec. 2-205.1. Service on voluntary unincorporated associations. A voluntary unincorporated association sued in its

own name may be served by leaving a copy of the process with any officer of the association personally or by leaving a copy of the process at the office of the association with an agent of the association. A voluntary unincorporated association sued in its own name may also be notified by publication and mail in like manner and with like effect as individuals.

(Ch. 110, new par. 2-209.1)

Sec. 2-209.1. A voluntary unincorporated association may sue and be sued in its own name, and may complain and defend in all actions. For the purposes of this Code, "voluntary unincorporated association" means any organization of 2 or more individuals formed for a common purpose excluding a partnership or corporation.

Supreme Court, U.S.
FILED
SEP 27 1988
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No. 88-365 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

APRIL RIVARD, *et al.*,
Petitioners,
v.
CHICAGO FIRE FIGHTERS UNION,
LOCAL NO. 2, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

---

BRIEF IN OPPOSITION OF THE RESPONDENT INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-365

APRIL RIVARD, *et al.*,
Petitioners,

v.

CHICAGO FIRE FIGHTERS UNION,
LOCAL NO. 2, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

---

BRIEF IN OPPOSITION OF THE RESPONDENT INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO

STATEMENT OF THE CASE

In 1981 and 1982, petitioners filed suits in the Circuit Court of Illinois to recover damages for personal and property injuries alleged to have resulted from fires at their residences. These fires occurred during a strike by employees of the Chicago Fire Department. Petitioners sued the local and international unions to which the fire department employees belonged, as well as three officers of the local union in both their individual and representative capacities ("the respondents."). Other than the three

local union officers, petitioners did not name any of the union members as defendants. On motion of the respondents, the Circuit Court dismissed the actions because the respondents, as voluntary unincorporated associations or officers of same, were not subject to suit under the common law of Illinois. Pet. App. A-19-A-22.[1]

Petitioners appealed this ruling to the Illinois Appellate Court. While their appeal was pending, the Illinois General Assembly enacted a statute abrogating the common law and providing that from that point forward unincorporated associations could sue and be sued in the State. The Illinois Appellate Court held that this new statute should be applied retroactively and reversed the judgment of the Circuit Court. Pet. App. A-9-A-14.

Respondents appealed to the Supreme Court of Illinois, which reversed the Appellate Court and reinstated the judgment of the Circuit Court. Pet. App. A-2-A-8. The state Supreme Court held the statutory change to be substantive in nature and that petitioners had not presented a sufficient basis for overcoming the clear language of the statute and the presumption of prospectivity which applies to substantive statutes. The Court found it unnecessary to treat the other grounds on which respondents had appealed.

Petitioners' request for rehearing was denied. Pet. App. A-1-A-2.

REASONS FOR DENYING THE WRIT

The purported basis for this Court's jurisdiction to entertain the petition is § 1257(3) of the Judicial Code. 28 U.S.C. § 1257(3). However, the petition does not satisfy the requirements of that provision of the Code.

---

[1] The suits against the three officers in their individual capacities were not dismissed. The officers later successfully moved for summary judgment.

I. THE JUDGMENT BELOW DOES NOT DRAW INTO QUESTION THE CONSTITUTIONAL VALIDITY OF ANY STATE STATUTE

The Illinois Supreme Court decided this matter solely on the basis of statutory construction under the laws of Illinois. No treaty or statute of the United States was drawn into question. Likewise, no party contended that any state statute was repugnant to the U.S. Constitution. The petitioners' Constitutional argument, which was not addressed by the judgment below, was directed not at a statute, but at the State's continued adherence to the common law. Consequently, this Court is without jurisdiction to entertain the petition unless the abridgement of some Constitutional right has properly been raised.[2]

II. THE CONSTITUTION DOES NOT SPECIALLY SET UP ANY TITLE, RIGHT, PRIVILEGE OR IMMUNITY WHICH HAS BEEN AFFECTED BY THE JUDGMENT BELOW

In Illinois, prior to the enactment in 1983 of a statute to the contrary, the common law rule that an unincorporated association could not sue or be sued in its own name was in effect. After petitioners' lawsuits were dismissed based on this common law rule, the Illinois legislature enacted a statute permitting suits by and against unincorporated associations. Petitioners unsuccessfully argued before the Illinois Supreme Court that this statute should be applied retroactively to revive their suits.

The sole effect of the ruling below is to confirm the common law principle in Illinois that prior to 1983, suits brought by or against unincorporated associations in their own names were subject to dismissal because the associations were not recognized as legal entities for the

---

[2] Indeed, the State court's failure to even address petitioners' Constitutional arguments suggests that this Court should refrain from exercising jurisdiction over the petition. See, *Ellis v. Dixon*, 349 U.S. 458 (1955).

purposes of participation in litigation at law. Suits in Illinois for claims arising prior to that date must be brought by or against the members of the association, rather than the association itself.

The Constitution creates no right to sue an association, as opposed to its members. This Court long ago recognized that "at common law, an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the name of its members, and their liability had to be enforced against each member." *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344, 385 (1922). Accord: *Denver and Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 559 (1967); *Moffat Tunnel League v. United States*, 289 U.S. 113, 118 (1933) ("unless authorized by statute, [unincorporated voluntary associations] have no capacity to sue."). As the Court recognized in *Brown v. United States*, 276 U.S. 134, 140 (1928), to overcome the general common law rule, "[m]any of the states have adopted statutes expressly providing that such associations may be sued." Further, even absent such express statutory provision, "[s]uch a suit may be maintained in virtue of a necessary implication arising from statutory provisions although the statute does not in terms so provide." *Id.*

In *Coronado*, this Court implied from the breadth of *federal* regulation that unincorporated labor organizations are suable in *federal* courts for their acts. Similarly, in *Brown*, the Court implied from the Sherman Anti-Trust Act the right to subpena an unincorporated association of furniture manufacturers in conjunction with an antitrust suit. Conversely, in *Moffat Tunnel League*, the Court rejected an unincorporated association's challenge to an Interstate Commerce Commission ruling where no similar implication could be made from the pertinent federal statute.

The judgment below turns on an interpretation of an Illinois statute specifically allowing suits against unincorporated associations. There was no dispute that the statute was intended to change the common law of Illinois. The issue was the effective date of the statute's application. Petitioners asserted that the statute should be applied retroactively to permit their pre-enactment suits against respondent unincorporated labor unions; respondents contended that the statute should be deemed prospective in application only. The Supreme Court of Illinois determined that the change effectuated by the statute was substantive in nature and that the clear language of the statute indicating prospectivity could not be overcome by legislative history relied upon by petitioners. Thus, because their claims arose prior to the enactment of the statute, the common law rule was applied to petitioners' suits and they were dismissed.

Petitioners' plight is of their own making. Rather than institute litigation against the members of the respondents, they elected to sue the associations themselves. Even after being rebuffed in the trial court, petitioners made no effort to amend their complaints or initiate new ones. It was not the common law which barred the courthouse door to petitioners. Rather, petitioners themselves elected not to proceed in the manner which the precedent of both this Court and the Courts of Illinois had long enunciated must be followed. They cannot now be heard to complain of errors of a Constitutional dimension arising solely from their own choice of strategy.

In *Coronado*, this Court implicitly recognized that the decision to abrogate the common law rule was reserved for each individual jurisdiction. Referencing both the legislative and equity changes which had preceded *Coronado*, a unanimous Court noted that "this has had its influence on the law side of litigation, so that, out of the very necessities of the existing conditions and the utter impossiblity of doing justice otherwise, the suable char-

acter of [an unincorporated labor union] has come to be recognized *in some jurisdictions* . . . ." 259 U.S. at 388. (Emphasis added). In *Coronado*, the Court added the federal courts to those jurisdictions. Illinois did not elect to join the list until 1983.

The petition does not raise a matter of substantial federal concern. There are no conflicting federal or state court decisions. The impact of the judgment below is limited to Illinois, and probably to petitioners themselves.

Petitioners' due process arguments are wholly without merit. The common law rule did not deny petitioners meaningful access to the courts or a right to a hearing, they did it to themselves. They could have proceeded to obtain an adjudication of their claims by suing the persons whom the common law recognized as answerable to them, assuming the claims had merit. The petitioners, alone among litigants in Illinois, declined to do so.[3]

Petitioners' equal protection claim is also unavailing. They have not been singled out for treatment different from others. No litigant under the common law was permitted to sue an association. The common law applied equally to everyone. When the common law was changed, the effect was the same for all litigants.

Simply stated, the petition satisfies neither the jurisdictional constraints of Section 1257(3) of the Judicial Code, 28 U.S.C. 1257(3), nor Rule 17 of the Rules of this Court. It should be denied.

---

[3] Petitioners admit that the decisions of this Court clearly hold that the Seventh Amendment does not apply to the states. This issue was not addressed by the courts below, making this record an inappropriate one for this Court to take up the matter. Moreover, even assuming the application of the Seventh Amendment to the states, petitioners' failure to obtain a jury trial flowed directly from their failure to institute a viable action, despite their undenied ability to do so.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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* Counsel of Record

(3)

NO. 88-365

Supreme Court, U.S.
FILED
OCT 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

APRIL RIVARD, et al.,	)	On Petition for a
	)	Writ of Certiorari
Petitioners	)	to the Supreme
	)	Court of Illinois
-vs-	)	
	)	
CHICAGO FIRE FIGHTERS	)	
UNION, LOCAL NO. 2,	)	
et al.,	)	
	)	
Respondents	)	

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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ATTORNEYS FOR RESPONDENT
CERTAIN

21 pp

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NO. 88-365

IN THE
SUPREME COURT OF THE UNITED STATES

APRIL RIVARD, et al., Petitioners -vs- CHICAGO FIRE FIGHTERS UNION, LOCAL NO. 2, et al., Respondents	On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Certain Respondents the CHICAGO FIRE FIGHTERS UNION, LOCAL UNION NO. 2; FRANK MUSCARE, as President; WILLIAM REDDY, as First Vice President; and FRANK MURPHY, as Second Vice President; all of the CHICAGO FIRE FIGHTERS UNION, Defendants below, file this brief in opposition to the Petition for Writ of Certiorari.

PRELIMINARY STATEMENT

The Court should deny the petition because (1) the constitutional claims are facially frivolous, and (2) there is no claim of conflict to be resolved.

STATEMENT OF FACTS

Under Illinois common law, a voluntary unincorporated association could not sue or be sued in its own name. It could only sue or be sued by or against all of its members. Commencing in 1982, Petitioners brought separate suits in the Circuit Court of Cook County, Illinois, seeking money damages for injuries suffered as a result of fires that occurred during a 1980 strike by the Chicago Fire Fighters Union. Petitioners sued certain officers of the local union and both the local union and the international union,

voluntary unincorporated associations, in their own names.

The Illinois General Assembly, in 1955, adopted a law providing that a partnership could be sued in its own name and further providing that the partners were jointly and severally liable on a judgment against the partnership. Ill.Rev. Stat., Ch. 110, §2-411.

In Local 144, American Federation of Technical Engineers v. LaJeunesse, 63 Ill.2d 263, 347 N.E.2d 712 (1976), the Illinois Supreme Court refused to alter the common law with respect to labor unions, explicitly deferring to the legislature. From 1976 through 1983, the Illinois Supreme Court annually recommended legislative action to abrogate the common law as to unions, but the Illinois General Assembly did not respond. The Circuit Court dismissed

the suits because they had been brought in derogation of the common law.

The Illinois Appellate Court, in an opinion filed June 4, 1986, reversed on the ground that an intervening statute adopted by the Illinois General Assembly effective January 1, 1984, allowed voluntary unincorporated associations to sue and be sued in their own names and that the statute would be applied retroactively.

In an order entered June 10, 1986, (Appendix), the Circuit Court then dismissed the Complaints on the ground that there is no legal duty to provide adequate fire protection services, and, therefore, no cause of action. 1/

1/ This rule of law was later upheld by the Illinois Appellate in a similar case resulting from the 1980 fire fighter strike. Jackson v. Chicago Fire Fighters Union, 160 Ill.App.3d 975, 513 N.E. 2d 1002 (1987).)

The Illinois Supreme Court then reversed the Appellate Court decision, holding that the intervening statute was not retroactive and that the common law, therefore, applied to this case.

REASONS FOR DENYING THE PETITION

Petitioners' stated reasons for granting the writ can be characterized as esoteric legal theories lacking any clear nexus to the facts of this case. We particularize below in corresponding order to the points discussed in the Petition.

I. PETITIONERS HAVE NOT BEEN DENIED ACCESS TO THE COURTS.

Petitioners had access to the Illinois courts. They were entitled to sue any individual against whom they asserted a claim. They were also

entitled to reach the union treasury by a suit against all union members. They declined to bring either action. Instead, they brought an action against a legally non-existent entity, claiming that the State of Illinois was constitutionally obligated to create a fictional entity against whom they could bring suit.

Citing Boddie v. Connecticut, 401 U.S. 371 (1971), Petitioners equate state legislation and the common law, contending that the same standards govern state inaction as state action. No authority is cited for the proposition that states are required to repeal and/or replace the common law and we know of none.

Moreover, when government acts affirmatively to change the common law as to voluntary associations, legislative policy judgments necessarily are involved. For example, when the

Congress created a contract claim against unions by adopting Section 301 of the Labor-Management Relations Act, it exculpated union officers and members from individual liability. Atkinson v. Sinclair Refining Company, 370 U.S. 238 (1962). The Illinois General Assembly, however, when making partnerships suable, retained the rule of individual liability of partners. Ill.Rev.Stat., Ch. 110, Sec. 2-411. In the instant case, there was no guarantee that the General Assembly would not diminish or eliminate the cause of action against individuals if it made unions suable entities. For this additional reason there is no constitutional infirmity when a state fails to substitute a new scheme in replacement of the common law.

II. THE COMMON LAW RULE DOES NOT DENY PETITIONERS THEIR CIVIL RIGHTS.

A. Petitioners are not denied a jury trial.

The Seventh Amendment of the Constitution of the United States protects the right of civil jury trial as it existed under the common law. Article I, §13 of the Illinois Constitution does the same. Petitioners, however, contend that they are entitled to a jury trial on a claim which could not be brought under common law. No rationale is offered to support this facially erroneous and internally contradictory proposition.

Additionally, Petitioners argue that they are entitled to a jury trial with respect to a legally deficient Complaint. Their contention is that a case, in which a jury trial would otherwise be available, cannot be disposed of by a court on a question of law. Under

this reasoning, a judgment on the pleadings entered pursuant to Rule 12 of the Rules of Civil Procedure for the United States District Courts or summary judgment entered pursuant to Rule 56 thereof would be unconstitutional.

Petitioners were in fact entitled to a jury trial had they filed valid complaints or even properly amended their complaints once they were dismissed. However, they chose not to do so but rather to rest on their complaints.

Petitioners concede that they are requesting this Court to reconsider its previous decisions that the Seventh Amendment does not apply to the states. This is obviously not the case to embark upon consideration of such a grandiose issue.

B. Petitioners are not denied their right to petition the government.

This case has been heard and decided by the Illinois Supreme Court under Illinois law. Petitioners argue that the Illinois law is infirm. The contention by Petitioners that they were denied their right to petition the government, at most, is tantamount to the claim that Petitioners were denied access to the courts. Our response to that claim is equally applicable here.

III. REVIEW IS NOT WARRANTED BECAUSE THERE IS NO LEGAL CLAIM.

The Circuit Court of Cook County dismissed the Complaints on motion of the union officers on the ground that there is no duty to provide adequate fire protection services and, therefore, no tort or contract action lies for the failure to do so. That is the law of

Illinois. Jackson v. Chicago Firefighters Union, 160 Ill.App.3d 975, 513 N.E.2d 1002 (1987). It is also the law in the other states. See Jamur Products Corporation v. Quill, 273 N.Y.S.2d 348 (1966); Burns v. Local 100, Transport Workers Union, 464 N.Y.S.2d 712 (N.Y.Ct.App. 1983); Burke and Thomas v. IOMM&P, 600 P.2d 1282 (Wash. 1979); Fulenwider v. Firefighters Association Local Union 784, 649 S.W.2d 268 (Tenn. 1983); Lamphere Schools v. Lamphere Federation of Teachers, 400 Mich. 104, 252 N.W.2d 818 (1977); City of Fairmont v. Retail, Wholesale Union, AFL-CIO, 283 S.E.2d 589 (W.Va. 1981). Additionally, the federal courts have held that there is no constitutional right to adequate fire protection, Shortino v. Wheeler, 531 F.2d 938 (8th Cir. 1976); Ready v. Mullins, 456 F.Supp. 955 (W.D.

Va. 1978); or to adequate police protection, Reiff v. City of Philadelphia, 471 F.Supp. 1262 (E.D. Pa. 1979).

The fact that there is no cause of action under Illinois law is an additional reason why review is not warranted.

CONCLUSION

Certain Respondents respectfully request the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

GILBERT FELDMAN
CORNFIELD AND FELDMAN,
Attorneys for Respondents Certain

APPENDIX

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

RIVARD et al
PLAINTIFFS

v.

CFFM LOCAL NO. 2 ET AL.
and DEFENDANTS
CARTER et al. —

VS

MUSCARE DEFENDANTS

NO. S 82L 4110
CONSOLIDATED
81L 7177

ORDER

THIS CAUSE COMING ON TO BE HEARD ON THE MOTION OF THE INDIVIDUAL DEFENDANTS FRANK MUSCARE, BILL ZIEDDI AND FRANK MURPHY TO RECONSIDER THIS COURT'S PREVIOUS ORDER ENTERED ON JUNE 6, 1983 AND THE COURT BEING FULLY ADVISED IN THE PREMISES AND FOR THE REASONS SET FORTH IN THE ATTACHED MEMORANDUM OF OPINION FILED ON JUNE 10, 1986,

IT IS HEREBY ORDERED THAT:

1. DEFENDANTS' MOTION TO RECONSIDER IS GRANTED;
2. THIS COURT'S PRIOR ORDER ENTERED ON JUNE 6 1983 IS VACATED; and
3. PLAINTIFFS' COMPLAINT ETC. DISMISSED.

ENTERED
CLERK OF THE CIRCUIT COURT
MORGAN M. FINLEY
JUN 10 1986
FILED
JUN 10 1986

Atty No.
Name J. DALE BERRY
Attorney for DEFENDANTS
Address CORNFIELD & FELDMAN
City 343 S. DEARBORN
Telephone CHICAGO
922 2800

..... 19.....
JUDGE THOMAS J. O'BRIEN
ENTER
DEPUTY CLERK

THOMAS J. O'BRIEN
Judge Judge's No.

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

FILED

JUN 5 1985

THOMAS J. O'BRIEN

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

April Rivard, et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 82 L 4100
	)	
Chicago Fire Fighters Union, Local No. 2, et al.	)	Consolidated for purpose of adjudicating Defendants' Motion to Dismiss with:
Defendants.	)	
	)	
and	)	
	)	
Bonnell Carter, et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 81 L 7177
	)	
Frank Muscare	)	
	)	
Defendants.	)	

MEMORANDUM OF OPINION

This Court granted defendants leave to file their motion to reconsider, allowed plaintiffs to file a written response, and took the matter under advisement on the briefs and without oral argument.

A similar case, Jackson v. Chicago Fire Fighters Union Local #2 et al, 84 L 6667, was dismissed by this Court after issuing a Memorandum Opinion on August 9, 1985. Although the reasons for the dismissal are set forth in the Opinion, generally speaking this Court felt obligated to dismiss Jackson on the basis of a later appellate court ruling in

Galuszynski v. City of Chicago, 131 Ill.App.3d 505 (1st Dist. 1985) which found that no duty existed between a public employee (policeman) and a member of the general public in the absence of a special relationship. Judicial consistency requires the same result here unless the argument of plaintiffs dictate otherwise.

The suggestion that this Court is bound by the doctrine of "Law of the Case" is rejected since a trial judge is not bound by the prior order of another judge and he may review an order if in his judgment it was erroneous. Furthermore he has the duty so to do if a change of facts or circumstances make the prior order unjust. Scardina v. Colletti, 63 Ill.App.2d 481 (1st Dist. 1965). A court is not bound by the prior orders of another judge and it has the power to correct erroneous orders after careful consideration. Towns v. Yellow Cab Co., 73 Ill.2d 113 (1978). Certainly the same rationale applies to reconsideration of a judge's own orders.

As stated in the Jackson opinion, this Court believes the threshold issue is one of duty. A thorough review of plaintiffs' arguments does not convince the Court that it should not vacate its prior ruling and enter an order for dismissal consistent with Jackson v. Chicago Fire Fighters and Galuszynski. The Court believes its analysis in Jackson is the correct application of Illinois law as to the duty of a public employee who withholds services. This conclusion, like it or not, logically follows from the rationale stated

in both Galuszynski and Marshall v. Ellison, 132 Ill.App.3d 505 (1st Dist. 1985)

In response to plaintiffs invitation to follow California cases interpreting its tort immunity act, this Court responds by acknowledging its obligation to follow Illinois law where it exists, rather than speculating as to whether Illinois would adopt the rationale of California Courts as to the meaning of similar statutes. As this Court alluded to in its Jackson opinion, plaintiffs do not competently allege acts of active interference with fire fighting conduct. (See, footnote #1 Jackson opinion.) Simply put, the withholding of services under the circumstances alleged in plaintiffs' complaints creates no special relationship upon which a duty can be found under Galuszynski.

Plaintiffs' argument that they had a reasonable expectation of reliance on fire protection services is an argument that equally could have been made in Galuszynski. Certainly the telephone communication to police requesting help and receiving a late response or no response at all is no different than the acts alleged in the instant case. The intentional withholding of services, while morally reprehensible, does not create any special relationship or duty. As the appellate court instructs, "It is well settled that the duty of the police is to preserve the well being of the community at large, and that such duty is generally not owed to specific individuals." Galuszynski v. City of Chicago, 131 Ill.App.3d at 506. Although the plaintiffs in Galuszyn-

ski invited the appellate court to follow the rationale of a New York case, De Long v. County of Erie 89 App.Div.2d 376, 455 N.Y.S. 2d 887 (1982), wherein it was held the municipality assumed a duty, our appellate court rejected the New York court's analysis, observing it "was not written with an eye toward the Illinois Governmental Immunity Act or the Illinois decisional law regarding the 'special duty' exception to the immunity afforded therein." Galuszynski v. City of Chicago, 131 Ill.App.3d at 509 (emphasis added).

Plaintiff's suggestion that this Court's interpretation of the Tort Immunity Act would lead to bizarre results is not a fair reading of the Jackson opinion. Comparing the acts of a firefighter who at the scene of a fire commits arson or theft with the acts of a firefighter who illegally withholds his services is not an even-handed comparison. Although a firefighter may owe only a duty to the general public in fighting a fire obviously he owes a duty to the identifiable owners of private property not to intentionally damage it or convert it to his own use. Such is not the case alleged in plaintiffs' complaints where the harm done is to a member of the general public under circumstances where no special duty exists.

For the above reasons as well as those stated in the Jackson opinion the court grants defendants' motion to reconsider, vacates it prior order of June 6, 1983, and grants defendants' Motion to dismiss the Complaints.

Defendants shall draft an order consistent with this Memorandum of Opinion.

ENTERED
ENTERED OF THE CIRCUIT COURT
MORGAN M. FINLEY
JUN 5 1996
THOMAS J. O'BRIEN

Date:

Judge Thomas J. O'Brien